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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

SHEREE RENA WALDON,

Defendant and Appellant.

E035119

(Super.Ct.No. RIF 106682)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Timothy J. Heaslet,  
Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Gary W. Schons, Senior Assistant Attorney General, Quisteen S. Shum and  
Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant was charged with the attempted willful, deliberate, and premeditated murder of Davona Saunders (Pen. Code, §§ 664 & 187; count 1),<sup>1</sup> assaulting Saunders with a firearm (§ 245, subd. (a)(2); count 2), and personally using a firearm during the commission of the offenses (§§ 12022.5, subd. (a)(1) & 1192.7, subd. (c)(8)). A jury found defendant guilty of the attempted murder (count 1), but found it was not willful, deliberate, and premeditated. The jury also convicted defendant of assault with a firearm (count 2), and found both personal use allegations true. Defendant was sentenced to 17 years in prison.<sup>2</sup>

Defendant appeals, claiming four instructional errors. First, she contends that CALJIC No. 2.06, as given, constituted an argumentative or “impermissible prosecution pinpoint instruction” and lessened the prosecution’s burden of proving her guilty. We agree that the instruction was argumentative, but conclude that the error was harmless under *Watson*,<sup>3</sup> and that the instruction did not lessen the prosecution’s burden of proof.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Defendant’s sentence consisted of seven years (the midterm) on count 1, plus 10 years for the personal use enhancement. Additional terms were imposed on count 2 and on the enhancement on count 2, but these terms were stayed pursuant to section 654.

<sup>3</sup> *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

Defendant further contends that the trial court prejudicially erred in failing to sua sponte instruct the jury (1) on the *Dewberry*<sup>4</sup> principle in counts 1 and 2, (2) with CALJIC No. 5.17, or a similar instruction on imperfect self-defense as a basis for the lesser included offense of attempted voluntary manslaughter in count 1, and (3) with CALJIC No. 17.01, or a similar unanimity instruction in count 2. We conclude that each of these contentions are without merit. Accordingly, we affirm the judgment.

### FACTS AND PROCEDURAL HISTORY

On November 4, 2002, at approximately 8:00 p.m., Saunders, her niece, 14-year-old T. S., and several other persons, including Cassandra Barkley and William Brown, were gathered around a stairway at an apartment complex in Moreno Valley. The stairway led to defendant's apartment, which defendant shared with Barkley. T. S. was living with Saunders. At least some of the people gathered around the stairway were drinking.

Defendant walked up and told T. S. she was not supposed to be there. Saunders and defendant began arguing. Saunders hit defendant, and the two women fought for approximately five to seven minutes. Barkley broke up the fight. Barkley and defendant went into their apartment, where Barkley helped defendant clean up. Defendant's hands were bloody and her acrylic nails were torn.

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<sup>4</sup> *People v. Dewberry* (1959) 51 Cal.2d 548, 555 (*Dewberry*).

No more than five minutes later, defendant came out of her apartment with a gun, approached Saunders, and said, “What’s up? What’s up, bitch?” and “What’s up, bitch? I’ll shoot you.” From a distance of approximately 10 feet, defendant pointed the gun at Saunders’s chest, and “fiddled” with the trigger. Saunders and T. S. heard a “click,” but the gun did not fire. Defendant looked down at the gun. At that point, Saunders “rushed” defendant and hit her. Defendant then hit Saunders in the head with the gun. As defendant and Saunders fought, defendant dropped the gun.

At that point, defendant’s boyfriend, Kaheal Parrish, picked up the gun and passed it to Brown. Brown saw that the gun was cocked, and tried to disarm the gun by firing it into the ground. The gun would not fire; its trigger was pulled back and “locked.” The gun discharged unexpectedly in Brown’s hand. Brown said he “wrestled the gun to somebody” and went home. Later, someone returned the gun to defendant’s apartment.

In the meantime, defendant and Saunders continued to fight. Defendant pulled Saunders by the hair and dragged her into defendant’s apartment. Defendant said, “Is this what you wanted, bitch?” and “I’ll hurt you” or “I’ll fuck you up.” As the two women struggled in the kitchen area of the apartment, defendant told someone to close the door. At that point, Barkley broke up the fight, and Saunders and T. S. returned to their apartment.

Saunders’s boyfriend, Craig Thomas, called 911. Riverside County Sheriff’s Deputies Clear and Lawler arrived at defendant’s apartment at approximately 9:00 p.m.,

and knocked on the door. After two or three minutes, defendant opened it. In the meantime, a third deputy, Rhodes, was outside watching the rear of the apartment. Deputy Rhodes heard a window slide open and a thud. Then he heard the window slam shut. He found a .38-caliber revolver in the bushes under the window. The gun contained four live rounds and one spent cartridge.

Deputy Lawler interviewed defendant inside her apartment. Initially, defendant told Deputy Lawler that she did not know anything about a gun during the fight. After Deputy Lawler told defendant that police found a gun at her back door, defendant admitted she dropped the gun out the window. She said she was afraid she would get in trouble for having the gun because it was not registered to her. She said she had retrieved the gun from her underwear drawer, but had not taken it outside.

Defendant also told Deputy Lawyer that, once Saunders was in her apartment, she could do “anything that she wanted to with her,” and, if she wanted to, she could kill her. While Deputy Lawler was writing notes, defendant said she didn’t know that revolvers had safeties, and “I thought if you pulled the trigger on a revolver, it would fire.”

A criminalist, Michele Merritt, testified that the gun was in proper working condition and had no external safety. She said that when the hammer is manually cocked, the gun will make a “click” sound. She said it is possible for a gun to fail to fire if the bullet does not line up with the barrel. In addition, where the firing pin hits the primer, but not hard enough to fire the round, the firing pin leaves a dimple or “divot” on

the primer. Of the four live rounds in the defendant's gun, two were dimpled. The gun was loaded with hollow point bullets.

Apparently, the jury instructions were discussed in chambers and were not reported. Thus, there is no record of defense counsel objecting to CALJIC No. 2.06, in the form given, of which defendant now complains. Nor is there any record of defense counsel requesting any of the instructions defendant now contends the trial court had a duty to give sua sponte, including (1) a specific *Dewberry* instruction, (2) CALJIC No. 5.17, or a similar instruction on imperfect self-defense, and (3) CALJIC No. 17.01, or a similar unanimity instruction.

Additionally, the parties stipulated that the court reporter would not report the jury instructions, and the jury instructions were not reported. The clerk's transcript, however, includes copies of the jury instructions as given.

## DISCUSSION

### *A. As Given, CALJIC No. 2.06 Was Improperly Argumentative, But the Error Was Harmless Under Watson*

Defendant contends that CALJIC No. 2.06, as given, was an "impermissible prosecution pinpoint instruction." In other words, she contends that the instruction was argumentative and therefore erroneously given, because it told the jury it could consider *specific evidence* of her attempt to suppress evidence as a circumstance tending to show

she had a consciousness of guilt. We agree that the instruction was argumentative and therefore erroneously given, but find the error harmless.<sup>5</sup>

CALJIC No. 2.06 told the jury: “If you find that a defendant attempted to suppress evidence against herself in any manner, such as *by concealing evidence by throwing the firearm out the window*, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”<sup>6</sup> (Italics added.)

“A court may—and, indeed, must—refuse an instruction that is argumentative, i.e., of such a character as to invite the jury to draw inferences favorable to one of the parties from *specified items of evidence*.” (*People v. Gordon* (1990) 50 Cal.3d 1223, 1276, italics added.) “In a proper instruction, “[w]hat is pinpointed is not specific

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<sup>5</sup> The People contend that defendant has waived or forfeited her right to raise this issue on appeal, because there is no record that defense counsel objected to the instruction in the trial court. As noted, it appears that jury instructions were discussed in chambers and off the record; thus, there is no record of defense counsel objecting to the instruction. Assuming, without deciding, that defendant has preserved the issue for appeal, we proceed to address it.

<sup>6</sup> Unmodified, CALJIC No. 2.06 reads: “If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by \_\_\_\_\_], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

evidence as such, but the *theory* of the defendant's [or the prosecution's] case."

[Citation.]" ( *People v. Daniels* (1991) 52 Cal.3d 815, 870.) "[T]he effect of certain facts on identified theories "is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate." [Citation.]' [Citation.]" ( *People v. Roberts* (1992) 2 Cal.4th 271, 314.)

As given, CALJIC No. 2.06 was argumentative, because it invited the jury to infer that defendant had a consciousness of guilt, based on the specific evidence that she threw the firearm out the window. Thus, the instruction improperly related particular evidence to the issue of whether defendant suppressed evidence and therefore had a consciousness of guilt. The instruction would have been proper had it merely referred to defendant's attempt to suppress evidence "by concealing evidence" and not to any specific evidence supporting the instruction.<sup>7</sup> The latter was properly left to the prosecution's argument.

Nevertheless, the error was harmless under the *Watson* standard. ( *People v. Earp* (1999) 20 Cal.4th 826, 886-887.) The evidence of defendant's guilt was strong, and the argumentative portion of CALJIC No. 2.06 was a minor point. Defendant did not testify and did not contest her admission that she threw the gun out the window. It is thus not

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<sup>7</sup> See, e.g., *People v. Randle* (1992) 8 Cal.App.4th 1023, 1036-1037 (CALJIC No. 2.06 properly referred to attempt to suppress evidence "by a change of appearance"), and *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1296-1297 (CALJIC No. 2.06 properly referred to defendant's attempt to suppress evidence "by destroying evidence").

reasonably probable that the argumentative portion of the instruction affected the jury's verdicts in any way.

Lastly, we reject defendant's adjunct argument that CALJIC No. 2.06 lessened the prosecution's burden of proof, because it told the jury it could infer that *she was guilty* based on the evidence that she threw the gun out the window. The instruction did no such thing. Instead, it told the jury that it could consider the evidence that defendant threw the gun out the window as a circumstance tending to show that she had a consciousness of guilt. Defendant concedes that this was a permissible inference. (Evid. Code, § 413; *People v. Downs* (1952) 114 Cal.App.2d 758; see also *People v. Kelly* (1992) 1 Cal.4th 495, 531.) Additionally, the instruction told the jury that the suppression evidence was not sufficient by itself to prove defendant's guilt.

*B. The Jury Was Adequately Instructed on the Dewberry Requirement*

Defendant contends that the trial court prejudicially erred in failing to sua sponte instruct the jury on the *Dewberry* principle relative to counts 1 and 2. She argues that the jury should have been instructed to resolve, in her favor, any reasonable doubt it had concerning whether she committed the charged offenses in counts 1 and 2 of attempted murder and assault with a firearm, respectively, or the lesser, uncharged offenses of attempted voluntary manslaughter and simple assault, respectively.<sup>8</sup>

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<sup>8</sup> Defendant argues that the jury should have been instructed substantially as follows: "If you are satisfied beyond a reasonable doubt that the defendant committed a criminal offense, but you have a reasonable doubt whether the offense committed was  
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It is well settled that, “when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense.” (*Dewberry, supra*, 51 Cal.2d at p. 555.) This is the *Dewberry* requirement. In any case involving a lesser offense, a *Dewberry* instruction must be given sua sponte. (*People v. Reeves* (1981) 123 Cal.App.3d 65, 69, disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6; *People v. Aikin* (1971) 19 Cal.App.3d 685, 703-704, disapproved on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 514.)

Here, the jury was not given CALJIC No. 8.72 [Doubt Whether Murder or Manslaughter] relative to count 1.<sup>9</sup> It was, however, given CALJIC No. 17.10 [Conviction of Lesser Included or Lesser Related Offense—Implied Acquittal—First], relative to counts 1 and 2.<sup>10</sup> Nevertheless, defendant argues that CALJIC No.17.10 did

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\_\_\_\_\_ [greater offense] or \_\_\_\_\_ [lesser offense], you must give the defendant the benefit of the doubt and find him not guilty of \_\_\_\_\_ [greater offense].”

<sup>9</sup> CALJIC No. 8.72 provides: “If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.”

<sup>10</sup> CALJIC No. 17.10 told the jury: “If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict her of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of Attempted Voluntary Manslaughter is lesser  
[footnote continued on next page]

not adequately instruct the jury on the *Dewberry* principle, relative to counts 1 or 2, and that the trial court erred in failing to give CALJIC No. 8.72.

We disagree. CALJIC No. 17.10, together with CALJIC No. 2.90, satisfied the *Dewberry* requirement relative to counts 1 and 2.

In *People v. Crone* (1997) 54 Cal.App.4th 71, 76, this court noted that CALJIC No. 17.10 satisfies the *Dewberry* principle where, as here, the defendant is charged with an offense that includes one or more lesser, uncharged offenses. (*People v. Crone, supra*, at p. 76, citing *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793-794, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330 and *People v. St. Germain* (1982) 138 Cal.App.3d 507, 520-522; contra, *People v. Reeves, supra*, 123 Cal.App.3d at p. 69; accord, *People v. Bajas* (2004) 120 Cal.App.4th 787, 793-794 [CALJIC No. 17.10 satisfies *Dewberry* requirement where blanks are filled in for charged offense of murder and uncharged, lesser offense of manslaughter].)

Indeed, CALJIC No. 17.10, as given, told the jury it could *not* convict defendant of the charged offenses in counts 1 or 2, but could only convict her of the lesser included

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to that charged in Count 1. [¶] The crime of Simple Assault is lesser to that of Assault with a Firearm as charged in Count 2. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crimes charged in Counts 1 and 2 or of any lesser crimes. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged crime.”

offense in each count if it had a reasonable doubt whether she was guilty of the charged offense. This was the same as instructing the jury to resolve, in defendant's favor, any reasonable doubt whether defendant was guilty of each greater offense or lesser offense. Additionally, CALJIC No. 2.90 instructed the jury that it could not convict defendant of *any* offense without proof beyond a reasonable doubt. Thus, the jury was effectively instructed on the *Dewberry* requirement.

In any event, any error was harmless. (*People v. Reeves, supra*, 123 Cal.App.3d at p. 70, applying *Watson, supra*, 46 Cal.2d at p. 836.) Again, the evidence of defendant's guilt was strong. After defendant initially fought with Saunders, she went into her apartment, retrieved a gun, came back outside, and attempted to shoot Saunders in the chest. When the gun did not fire, defendant hit Saunders in the head with it. Thus, even if the jury had been instructed as defendant contends, it is not reasonably probable that it would have acquitted defendant on either counts 1 or 2, or found her guilty of either of the lesser included offenses, namely, attempted voluntary manslaughter based on heat of passion (count 1) and simple assault (count 2).

*C. Substantial Evidence Did Not Support an Instruction on Imperfect Self-Defense*

Defendant contends that the trial court prejudicially erred in failing to instruct the jury sua sponte with CALJIC No. 5.17,<sup>11</sup> on unreasonable or imperfect self-defense as a

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<sup>11</sup> CALJIC No. 5.17 states: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty

*[footnote continued on next page]*

basis for finding defendant guilty of the lesser included offense of attempted voluntary manslaughter in count 1. We disagree. There was no evidence that defendant actually believed, even unreasonably, that she was in imminent danger of death or great bodily harm when she emerged from her apartment, pointed a gun at Saunders’s chest, and pulled the trigger.

“If a person kills or attempts to kill in the unreasonable but good faith belief in having to act in self-defense, the belief negates what would otherwise be malice, and that person is guilty of voluntary manslaughter or attempted voluntary manslaughter, not murder or attempted murder. [Citation.]” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) The doctrine of imperfect self-defense is a narrow one. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) “It requires without exception that the defendant must have had an *actual* belief in the need for self-defense.” (*Ibid.*)

Imperfect self-defense, like self-defense, also requires a fear of *imminent* harm. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) “Fear of future harm—no matter

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of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an ‘imminent’ [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary’s [use of force], [attack] [or] [pursuit].]”

how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant’s fear must be of *imminent* danger to life or great bodily injury. . . . “*An imminent peril is one that, from appearances, must be instantly dealt with.*” . . .” (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783.)

A trial court does not have a duty to give CALJIC No. 5.17, or otherwise instruct on imperfect self-defense, as a basis for voluntary or attempted voluntary manslaughter, unless there is substantial evidence supporting the instruction. (*In re Christian S.*, *supra*, 7 Cal.4th at p. 783; *People v. Barton* (1995) 12 Cal.4th 186, 201.) We review the question as one of law. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016-1017.)

Here, there was no evidence that defendant *actually* believed, even unreasonably, that she was in imminent danger of death or great bodily injury when she attempted to shoot Saunders. After defendant initially fought with Saunders, defendant went into her apartment to clean herself up. Not more than five minutes later, defendant came out of her apartment with a gun, pointed it at Saunders’s chest, and pulled the trigger. At that time, there was no indication that defendant actually believed she was in imminent fear of death or great bodily injury. There was no evidence that Saunders had attempted to enter defendant’s apartment or that defendant believed she would.

Thus, there was no substantial evidence to support giving CALJIC No. 5.17, or a similar instruction on imperfect self-defense. (See, e.g., *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1267-1270 [no substantial evidence to support CALJIC No. 5.17].)

D. *The Trial Court Did Not Have a Duty to Give a Unanimity Instruction in Count 2*

Defendant contends that the trial court erred in failing to give CALJIC No. 17.01,<sup>12</sup> or a similar unanimity instruction, in count 2. We disagree.

A unanimity instruction must be given sua sponte “where the evidence adduced at trial shows more than one act was committed which could constitute the charged offense, and the prosecutor has not relied on any single such act.” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-275.) But “no unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct.” (*Id.* at p. 275; *People v. Rae* (2002) 102 Cal.App.4th 116, 122.)

“The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) In other words, no unanimity instruction is required when there is no danger that jurors will rely on different acts in finding a defendant guilty. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

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<sup>12</sup> CALJIC No. 17.01 states: “The defendant is accused of having committed the crime of \_\_\_\_\_ [in Count \_\_\_\_]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count \_\_\_\_] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count \_\_\_\_], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict.”

Here, the evidence showed that defendant pointed the gun at Saunders, pulled the trigger, and beat Saunders over the head with the gun when it did not fire. The acts of pointing the gun at Saunders and beating Saunders over the head with it were part of one continuous transaction. Moreover, there was no evidence that defendant committed one act, but not the other. Thus, there was no danger that the some jurors relied on one act, but not the other, in convicting defendant of assaulting Saunders with a firearm in count 2. Accordingly, no unanimity instruction was required.

#### DISPOSITION

The judgment is affirmed.

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/s/ King  
J.

We concur:

/s/ Ramirez  
P.J.

/s/ Gaut  
J.